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No. 98-85

In the

Supreme Court of the United States

October Term, 1998

JAMES B. HUNT, JR., *et al.*,

Appellants,

and

ALFRED SMALLWOOD, *et al.*,

Intervenor-appellants,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

STATE APPELLANTS' BRIEF ON THE MERITS

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54 pp

QUESTIONS PRESENTED

1. In a racial gerrymandering case, is an inference drawn from the challenged district's shape and racial demographics, standing alone, sufficient to support summary judgment for the plaintiffs on the contested issue of the legislature's predominant motive in designing the district, when that inference is directly contradicted by the affidavits of the legislators who drew the district?

2. In applying the *Shaw-Miller* predominance test, may a court rely on isolated and sporadic party registration data to reject a state's assertion that partisan political considerations were the predominant factor in a district's design, when the uncontroverted evidence established that the state used *actual voting results*, rather than party registration data, to shape the district's boundaries?

3. May a plaintiff subject a majority-majority district with a substantial minority population to the strict scrutiny of the *Shaw-Miller* doctrine, simply by showing that it is slightly irregular in shape and contains a higher concentration of minority voters than its neighbors, when there is absolutely no *additional* evidence that race was the predominant factor in its design?

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LIST OF PARTIES

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, DENNIS WICKER in his official capacity as Lieutenant Governor of the State of North Carolina, HAROLD BRUBAKER in his official capacity as Speaker of the North Carolina House of Representatives, ELAINE MARSHALL in her official capacity as Secretary of the State of North Carolina, and LARRY LEAKE, S. KATHERINE BURNETTE, FAIGER BLACKWELL, DOROTHY PRESSER and JUNE YOUNGBLOOD in their capacity as the North Carolina State Board of Elections, are appellants in this case and were defendants below;

ALFRED SMALLWOOD, DAVID MOORE, WILLIAM M. HODGES, ROBERT L. DAVIS, JR., JAN VALDER, BARNEY OFFERMAN, VIRGINIA NEWELL, CHARLES LAMBETH and GEORGE SIMKINS are intervenor-appellants in this case and were intervenor-defendants below;

MARTIN CROMARTIE, THOMAS CHANDLER MUSE, R. O. EVERETT, J. H. FROELICH, JAMES RONALD LINVILLE, SUSAN HARDAWAY, ROBERT WEAVER and JOEL K. BOURNE are appellees in this case and were plaintiffs below.

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TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES iii

TABLE OF AUTHORITIES ix

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. THE 1997 REDISTRICTING PROCESS 2
B. THE 1997 PLAN 4
C. LEGAL CHALLENGES TO THE 1997 PLAN 7
D. THE THREE-JUDGE DISTRICT COURT'S OPINION .. 11
E. THE INTERIM PLAN 14

SUMMARY OF ARGUMENT 14

ARGUMENT 16

I. THE DISTRICT COURT'S JUDGMENT SHOULD BE REVERSED BECAUSE PLAINTIFFS FAILED TO CARRY THEIR BURDEN OF PROVING THAT RACE WAS THE PREDOMINANT FACTOR IN THE DESIGN OF DISTRICT 12. 16

A. THE DISTRICT COURT APPLIED AN IMPROPER EVIDENTIARY STANDARD IN GRANTING PLAINTIFFS SUMMARY JUDGMENT. 17

B. PLAINTIFFS FAILED TO SATISFY THE DEMANDING PREDOMINANCE STANDARD NECESSARY TO SUPPORT STRICT SCRUTINY. 18

1. Plaintiffs' Circumstantial Evidence Derived From The Shape And Demographics Of The District Was Inadequate To Establish The Predominant Use Of Race. 22

2. Defendants' Direct Evidence Clearly Established That Non-Racial Goals Were The Predominant Factor In The Design Of District 12. This Evidence Was Sufficient Not Only To Defeat Plaintiffs' Motion But To Obtain Summary Judgment For Defendants. 24

II. THE DISTRICT COURT WRONGLY DENIED THE STATE'S CROSS-MOTION FOR SUMMARY JUDGMENT BECAUSE THE STATE PRESENTED SUBSTANTIAL AND CREDIBLE EVIDENCE THAT DISTRICT 12'S SHAPE AND RACIAL DEMOGRAPHICS WERE THE RESULT OF LEGITIMATE, NON-RACIAL, POLITICAL MOTIVES. 28

A. THE STATE'S RELIANCE ON VOTING BEHAVIOR DOES NOT TRIGGER STRICT SCRUTINY. 30

B. THE DISPARITY BETWEEN PARTY REGISTRATION AND VOTING BEHAVIOR IN NORTH CAROLINA EXPLAINS THE SHAPE AND RACIAL DEMOGRAPHICS OF DISTRICT 12. 31

C. TO DETERMINE THE LEGISLATURE'S PREDOMINANT MOTIVATION IN DESIGNING A DISTRICT THE COURT MUST CONSIDER THE DISTRICT AS A WHOLE. 34

III. APPLICATION OF STRICT SCRUTINY TO DISTRICT 12 IS UNWARRANTED BECAUSE IT DOES NOT GIVE RISE TO THE KINDS OF HARMS WITH WHICH THE *SHAW-MILLER* DOCTRINE IS CONCERNED. 38

CONCLUSION 44

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TABLE OF AUTHORITIES

CASES

Abrams v. Johnson, 521 U.S. 74 (1997) 6

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 17, 19, 26

Baker v. Carr, 369 U.S. 186 (1962) 37

Borden, Inc. v. Spoor, Behrins, Campbell, Young, Inc.,
828 F. Supp. 216 (S.D.N.Y. 1993) 26

Burns v. Richardson, 384 U.S. 73 (1966) 25

Bush v. Vera, 517 U.S. 952 (1996) ..... *passim*

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 17, 18

Davis v. Bandemer, 478 U.S. 109 (1986) 35

DeWitt v. Wilson, 515 U.S. 1170 (1995),
summarily aff'g, 856 F. Supp. 1409 (E.D. Ca. 1994) .. 40

Edwards v. Aguillard, 482 U.S. 578 (1986) 22, 43

Gaffney v. Cummings, 412 U.S. 735 (1973) 24, 42

Illinois v. Krull, 480 U.S. 340 (1987) 26

Johnson v. Miller, 922 F. Supp. 1556 (S.D. Ga. 1995),
aff'd, 521 U.S. 74 (1997) 4, 6

Johnson v. Mortham, 915 F. Supp. 1529 (N.D. Fla. 1995) 27

Joint Anti-Fascist Refugee Comm. v. Mc Grath, 341 U.S. 123 (1951) 26

Karcher v. Daggett, 462 U.S. 725 (1983) 25

Lawyer v. Department of Justice, 521 U.S. 567, 117 S. Ct. 2186 (1997) 20, 43

McDonald v. Board of Election Comm'rs of Chicago, 394 U.S. 802 (1969) 26

Miller v. Johnson, 515 U.S. 900 (1995) ..... *passim*

Mueller v. Allen, 463 U.S. 388 (1983) 26

Nunez v. Superior Oil Co., 572 F.2d 1119 (CA5 1978) .. 26

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 43

Rostker v. Goldberg, 453 U.S. 57 (1981) 26

Shaw v. Hunt (Shaw II), 517 U.S. 899 (1996) 2, 20, 21

Shaw v. Reno (Shaw I), 509 U.S. 630 (1993) . 19, 38, 39, 40

Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089 (CA3 1995) 43

Thornburg v. Gingles, 478 U.S. 30 (1986) 36

United States v. Hays, 515 U.S. 737 (1995) 39

Vera v. Bush, 933 F. Supp. 1341 (S.D. Tex. 1996) 4

White v. Weiser, 412 U.S. 783 (1973) 25

Wightman v. Springfield Terminal Ry. Co., 100 F.3d. 228 (CA1 1996) 18

STATUTES

28 U.S.C. § 1253 1

MISCELLANEOUS

11 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 56.03[4] 17

11 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 56.10[6] 18

11 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 56.11[1][b] 17

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STATE APPELLANTS' BRIEF ON THE MERITS

Governor James B. Hunt, Jr., and the other state defendants below appeal from the final judgment of the three-judge United States District Court for the Eastern District of North Carolina, dated April 6, 1998, which declared District 12 in the congressional redistricting plan enacted by the North Carolina General Assembly on March 31, 1997, unconstitutional and permanently enjoined defendants from conducting any elections under that plan.

OPINIONS BELOW

The April 14, 1998 opinion of the three-judge district court, which has not yet been reported, appears at JS at 1a.[1]

JURISDICTION

The district court's judgment was entered on April 6, 1998. On April 8, 1998, defendants filed an amended notice of appeal to this Court. Jurisdiction of this Court on appeal is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and Rule 56 of the Federal Rules of Civil Procedure, Summary Judgment. *See* JS at 169a & 171a-173a.

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[1] References to "JS" are to the Appendix of the Jurisdictional Statement; references to "JA" are to the Joint Appendix.

STATEMENT OF THE CASE

A. THE 1997 REDISTRICTING PROCESS

In *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899 (1996), this Court held that District 12 in North Carolina's 1992 congressional redistricting plan ("the 1992 plan") violated the Equal Protection Clause because race predominated in its design and it could not survive strict scrutiny. The matter was remanded to the district court for an appropriate remedy. On remand, the district court afforded the state legislature an opportunity to redraw the state's congressional plan to correct the constitutional defects found by this Court. The General Assembly established Senate and House redistricting committees to carry out this task. Senator Roy A. Cooper, III, a Democrat, was appointed Chairman of the Senate Committee and Representative Edwin McMahan, a Republican, was appointed Chairman of the House Committee. JS at 70a, 80a. Like the majority of members on the committees, neither Senator Cooper nor Representative McMahan had served on the committee that drafted the 1992 plan.[2]

In consultation with the legislative leadership, the committees determined that, to pass both the Democratic-controlled Senate and the Republican-controlled House, the new plan needed to maintain the existing partisan balance in the state's congressional delegation (a six-six split between Democrats and Republicans). Because party registration is not

[2] Only 11 of the 41 legislators appointed to these committees had served on the redistricting committees that drafted the 1992 plan. *See* Bartlett Aff. (CD 47), Vol. I Commentary at 5.

a reliable predictor of voting behavior, the committees used the actual votes cast in a series of elections between 1988 and 1996 to craft Democratic and Republican districts.[3] These election results were the principle factor that guided the committees in configuring the plan and in placing precincts within the districts. JS at 71a, 73a, 77a, 80a-81a, 81-82a.

In designing the plan, the committees sought to comply with the requirements of the Voting Rights Act, as well as the constitutional requirement of population equality. JS at 73a-77a, 82a-83a; JA at 63a. Well aware of their responsibilities under this Court's decision in *Shaw* and its progeny, however, the committees ensured that racial considerations did not predominate over race-neutral districting criteria. To this end, the new plan was designed: (1) to avoid dividing precincts; (2) to avoid dividing counties when reasonably possible;[4] (3) to

[3] The computerized data base the committees used to draw the plan included the total number of people in each precinct who voted for each major candidate in the 1988 Court of Appeals election, the 1988 Lieutenant Governor election, and the 1990 United States Senate election. *See* JA at 101-110. In addition, both the Senate and House committees used precinct-by-precinct election results for a series of statewide elections between 1990 and 1996 to draw the plan. JS at 73a, 81a.

[4] In North Carolina, as in most of the southeastern states, it is virtually impossible to design a congressional map that does not split any of the State's 100 counties, given the constitutional mandate of population equality and other legitimate districting concerns. Indeed, all of the southeastern states currently include multiple county divisions in their congressional plans, and in Florida's congressional plan 26 of 67 counties (38.8%) are divided. JS at 109a-110a, 115a-116a. For this reason, the committees chose to avoid dividing counties only to the extent reasonably possible.

eliminate cross-overs, double cross-overs, and other artificial means of maintaining contiguity; (4) to group together citizens with similar needs and interests; and (5) to ensure ease of communication between voters and their representatives. JS at 72a, 81a, 63a-64a. The committees did not utilize shape or mathematical compactness measures in constructing the plan.

The committees' strategy proved successful. On March 31, 1997, the North Carolina legislature enacted a new congressional redistricting plan, 1997 Session Laws, Chapter 11 ("the 1997 plan"), the redistricting law at issue in this case.[5] The plan was a bipartisan one, endorsed by the leadership of both parties in both houses. *See* JS at 77a, 82a-83a, 64a. However, twelve of the seventeen African-American members of the House voted against the plan because they believed it did not adequately take into account the interests of the State's African-American residents. *See* JS at 83a.

B. THE 1997 PLAN

The 1997 plan creates six "Democratic" districts and six "Republican" districts. These districts preserve the partisan cores of their 1992 predecessors, yet their lines are significantly different: they reassign more than 25% of the State's

[5] In this respect, the North Carolina legislature succeeded where other similarly-situated state legislatures have not. *See, e.g., Johnson v. Miller*, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995), *aff'd*, 521 U.S. 74 (1997) (on remand from this Court's decision in *Miller v. Johnson*, 515 U.S. 900 (1995)) (legislature abdicated its redistricting responsibilities to federal district court); *Vera v. Bush*, 933 F. Supp. 1341, 1342 (S.D. Tex. 1996) (on remand from this Court's decision in *Bush v. Vera*, 517 U.S. 952 (1996) (same).

population and nearly 25% of its geographic area. The most dramatic changes are in District 12, which contains less than 70% of its original population and only 41.6% of its original geographic area. JS at 130a-132a, 153a, 155a.

The 1997 plan respects the traditional race-neutral districting criteria identified by the legislature. In particular, District 12 divides only one precinct (a precinct that is divided in all local districting plans as well); it includes parts of only six counties; and it achieves contiguity without relying on artificial devices like cross-overs and double cross-overs.[6] It creates a district joining together citizens with similar needs and interests in the urban and industrialized areas along the interstate highways that connect Charlotte and the Piedmont Urban Triad, areas in which the bulk of the State's recent population growth has occurred. JS at 63a-67a, 73a-74a, 82a, Stuart Aff. (CD 47), Rpt. at 9-10. Of the 12 districts in the 1997 plan, it has the third shortest travel time (1.67 hours) and the third shortest distance (95 miles) between its farthest points, making it "highly accessible" for a congressional representative.[7] JS at 105a. Moreover, because District 12 is built around major transportation corridors, it functions effectively

[6] In contrast, District 12 in the 1992 plan divided 48 precincts; included parts of 10 counties; and achieved contiguity only by heavy reliance on artificial devices like cross-overs and double cross-overs. *See* JS at 63a.

[7] In contrast, District 12 in the 1992 plan had a travel time of 2.97 hours and a travel distance of 162.4 miles between its farthest points, ranking it in the bottom one-third of North Carolina's 12 districts based on time and distance. *See* JS at 105a-106a.

for representatives and for constituents.[8] Mathematical measures of geographic compactness were not among the criteria adopted by the legislature in designing the new plan. Even so, District 12's geographic compactness is significantly improved over the 1992 plan, though it remains relatively low.[9]

Seventy-five (75%) percent of District 12's registered voters are Democrats. More importantly, at least 62% of the district's registered voters voted for the Democratic candidate in the 1988 Court of Appeals election, the 1988 Lieutenant Governor election, and the 1990 United States Senate election. JS at 99a.

District 12 is not a majority-minority district by any measure: only 46.67% of its total population, 43.36% of its voting age population, and 46% of its registered voter

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[8] *See* Webster Report, JS at 124a-130a, 134a (noting that District 12's "focus upon major transportation corridors" makes its travel time compactness substantially better than that of many districts that score higher under mathematical measures of compactness). District 12 is similar in concept to Georgia's new Eleventh Congressional District, drawn by a three-judge district court when the Georgia legislature could not agree on a new plan in the wake of this Court's 1995 decision in *Miller*. The Eleventh District stretches from suburban Atlanta to the North Carolina and Tennessee borders, connecting parts of 13 different counties and splitting six of them. Because the district is built around the "connecting cable" of Interstate 85, however, and has a distinct "urban/suburban flavor," its residents have "a palpable community of interests." *Johnson v. Miller*, 922 F. Supp. at 1564. In *Abrams v. Johnson*, 521 U.S. 74 (1997), this Court upheld the Eleventh District as drawn.

[9] District 12's dispersion compactness measure in the 1997 plan is 142% improved over the 1992 plan and its perimeter compactness measure is 193% improved. *See* JS at 127a -128a, 143a-146a.

population is African-American.[10] Race was not a dominant or controlling factor in the development or enactment of the plan. JS at 77a, 83a, 87a-88a. Partisan voting patterns, not race, were the predominant basis for assigning voters to the district.[11] *See* JS at 66a-67a, 77a, 82a-83a, 99a.

Because 40 of North Carolina's 100 counties are subject to the preclearance requirements of Section 5 of the Voting Rights Act, the legislature submitted the 1997 plan to the United States Department of Justice for preclearance. The Department precleared the plan on June 9, 1997.

C. Legal Challenges To The 1997 Plan

Equal protection challenges to the 1997 plan were first raised in the remedial phase of the *Shaw* litigation, when the State submitted the plan to the three-judge court to determine whether it cured the constitutional defects in the earlier plan. Two of the plaintiffs who challenge the 1997 plan in the instant

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[10] In contrast, 56.63% of the total population, 53.34% of the voting age population, and 53.54% of the registered voter population of District 12 in the 1992 plan was African-American. *See* JA at 111-117.

[11] District 1 is another of the six "Democratic" districts established by the 1997 plan. Unlike District 12, District 1 is a majority-minority district by one measure: 50.27% of its total population is African-American. Like District 12, District 1 respects the traditional race-neutral redistricting criteria identified by the legislature. It contains no divided precincts, divides only 10 counties and achieves contiguity without relying on artificial devices like cross-overs and double cross-overs. It creates a district joining together citizens in the mostly rural and economically depressed counties in the State's northern and central Coastal Plain. *See* JS at 63a-67a, 73a-74a, 82a, JA at 101-105, Goldfield Aff. (CD 47), Rpt. at 8-12.

case - Martin Cromartie and Thomas Chandler Muse - participated as parties plaintiff in that remedial proceeding. So did Robinson Everett, who was both a named plaintiff and the plaintiffs' attorney in the *Shaw* case.

In that remedial proceeding, Everett and his co-plaintiffs ("the *Shaw* plaintiffs") were given an opportunity to litigate any constitutional challenges they might have to the 1997 plan, which the State had enacted under the *Shaw* court's injunction. They elected not to avail themselves of that opportunity.

Exercising its authority to review the State's proposed remedial plan, the court ruled that the plan was "in conformity with constitutional requirements" and that it was an adequate remedy for the constitutional defects in the prior plan "as to the plaintiffs and plaintiff-intervenors in this case." JS at 167a, 160a. On that basis, the court entered an order approving the plan and authorizing the state defendants to proceed with congressional elections under it. Everett and his co-plaintiffs took no appeal from that order.

Having forgone an opportunity to litigate their constitutional challenges to the 1997 plan before the three-judge court in *Shaw*, Everett and his co-plaintiffs sought to have those same claims adjudicated by a different three-judge court. They did so by amending a complaint in a separate lawsuit they had previously filed against the same defendants. In that amended complaint, Cromartie, Muse, and four persons who had not been named as plaintiffs in *Shaw* ("the *Cromartie* plaintiffs") - all represented by Everett - asserted racial

gerrymandering challenges to Districts 1 and 12 in the 1997 plan.[12]

On January 15, 1998, the *Cromartie* case was assigned to a three-judge panel. On January 30, 1998, four days before the close of the candidate filing period, the *Cromartie* plaintiffs moved for a preliminary injunction halting all further elections under the 1997 plan. Several days later, they also moved for summary judgment. The state defendants filed a cross-motion for summary judgment. On March 23, 1998, the last day on which the parties were allowed to file materials in support of the motions for summary judgment, the *Cromartie* plaintiffs filed their expert witness affidavits and various statistical

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[12] In their Jurisdictional Statement, the state defendants challenged the district court's ruling that the final judgment entered by the district court on remand from this Court's decision in *Shaw II* - a judgment which found the 1997 plan constitutional and authorized the State to proceed with elections under it - did not preclude the constitutional challenges to that very plan that are being asserted in this parallel proceeding. The state defendants continue to believe that the District 12 claims asserted in this case are barred by that final judgment because they are asserted by persons who must - in fairness - be considered "privies" of at least one of the named plaintiffs in *Shaw*, Robinson Everett. Because the policies behind the doctrine of claim preclusion are at their most compelling when the claims in question seek to enjoin a state's electoral processes, and the entry of two dramatically inconsistent judgments against a state in parallel litigation involving such closely affiliated plaintiffs is an affront to the integrity of the federal judicial system, this Court should craft a rule of privity that would bar these claims. The state defendants recognize that the record, as it now stands, may be insufficient to permit this Court to undertake that task. Accordingly, they have elected not to press that argument further on this appeal, but to save it for remand, should this Court deem a remand necessary for other reasons.

information, including maps showing partisan registration by precinct in portions of District 12.[13]

Eight days later, before either party had conducted any discovery and without an evidentiary hearing, the three-judge court heard brief oral arguments on the pending motions for preliminary injunction and summary judgment. Three days after that, on April 3, 1998, the court, with Circuit Judge Sam J. Ervin, III dissenting, granted the *Cromartie* plaintiffs' motion for summary judgment, declared District 12 in the 1997 plan unconstitutional, and permanently enjoined the state defendants from conducting any primary or general elections under the 1997 plan. JS at 45a. The court's order did not explain the basis for its decision, stating only that "[m]emoranda with reference to [the] order will be issued as soon as possible."[14] JS at 46a.

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[13] Prior to that point, plaintiffs only had filed several incompetent affidavits of laypersons with no personal knowledge about the redistricting process. *See* JA at 47-83 and at 137-155. Had they been afforded an adequate opportunity to respond to plaintiffs' eleventh hour showing, defendants could have cleared up the court's misunderstanding of plaintiffs' irrelevant registration data (that the redistricting committees had not used in fashioning the 1997 plan) with the more probative election results (that the committees in fact relied upon). *See* Argument II, *infra*.

[14] The state defendants immediately noticed an appeal to this Court. Since the elections process under the 1997 plan was already underway and the primary election only a few weeks away, they asked the district court to stay its April 3rd order pending disposition of that appeal. When it refused to do so, the state defendants made application to Chief Justice Rehnquist for a stay of the same order. The Chief Justice referred that application to the full Court, which denied it on April 13, 1998. When this Court denied the stay application, the district court had yet to issue its opinion explaining its order and permanent injunction.

D. The Three-Judge District Court's Opinion

On April 14, 1998, the three-judge court issued an opinion explaining the basis for its order and injunction of April 3, 1998. JS at 1a-44a. The court held that the *Cromartie* plaintiffs were entitled to summary judgment on their challenge to District 12, because the "uncontroverted material facts" established that the legislature had "utilized race as the predominant factor in drawing the District."[15] JS at 21a-22a. Unlike the lower courts whose "predominance" findings this Court upheld in *Miller*, *Bush*, and *Shaw II*, the court below did not base its finding on any *direct* evidence of legislative motivation; instead, it predicated its ruling of constitutional invalidity entirely on an inference drawn from the district's shape and racial demographics. JS at 19a-22a.

The court reasoned that District 12 was "unusually shaped," that it was "still the most geographically scattered" of North Carolina's twelve congressional districts, that its dispersion and perimeter compactness measures were lower than the mean for the twelve districts in the plan, that it "include[s] nearly all of the precincts with African-American population proportions of over forty percent which lie between Charlotte and Greensboro," and that when it splits cities and counties, it does so "along racial lines." The court concluded that these so-called "facts," established - as a matter of law - that the legislature had

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[15] The court also held that the Cromartie plaintiffs were *not* entitled to summary judgment on their challenge to District 1, the only majority-minority district in the 1997 plan. JS at 22a-23a.

"disregarded traditional districting criteria" and "utilized race as the predominant factor" in designing District 12." JS at 20a-22a.

Although the court acknowledged that the state defendants had produced evidence that partisan political preference, rather than race, was the predominant factor in the design of District 12, it chose not to credit this evidence because "the legislators excluded many heavily-Democratic precincts from District 12, even though those precincts immediately border the District."[16] JS at 20a.

Judge Ervin dissented. At the outset, he noted that the plaintiffs in this case - unlike those in *Miller*, *Bush*, and *Shaw II* - had presented no *direct* evidence that the legislature was motivated predominantly by racial considerations in designing District 12, but relied solely on an inference they claimed could be drawn from the district's shape and racial demographics. JS at 26a-29a. He found this inference decidedly weaker than those in the Court's prior cases, because District 12 was not a majority-minority district, it had not been drawn to comply with the Department of Justice's invalid "black maximization" policy, and its shape was "not so bizarre or unusual . . . that it cannot be explained by factors other than race."JS at 25a-26a, 30a-35a.

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[16] In reaching this conclusion, the court relied entirely on maps offered by plaintiffs showing the Democratic *registration* of precincts in Guilford, Forsyth and Mecklenburg Counties. JS at 8a-9a. (citing McGee Aff. (CD 61), Exhibits N, O and P). The uncontested evidence presented by the State, however, indicated that the legislature used election results, not party registration, to measure the partisan nature of the districts. JS at 73a, 81a.

In addition, Judge Ervin noted, the state defendants had rebutted the *Cromartie* plaintiffs' circumstantial evidence with "convincing" evidence that partisan political preference, rather than race, had been the predominant factor in drawing the district.[17] JS at 25a-26a, 34a-36a. According to Judge Ervin, the case law required the court to accept this evidence as true.[18] JS at 27a.

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[17] In addition to presenting affidavits from the legislators who drew the plan, the state defendants presented the expert statistical evidence of Dr. David W. Peterson. Dr. Peterson conducted a comprehensive statistical analysis of the correlation between District 12's boundary and the race, party affiliation, and political voting patterns of the voters in the precincts that touch along the inside and outside of that boundary. He concluded that the boundary's path "can be attributed to political considerations with at least as much statistical certainty as it can be attributed to racial considerations," that the statistical evidence "support[s] the proposition that creation of a Democratic majority in District Twelve was a more important consideration in its construction than was the creation of a black majority," and that "there is no statistical indication that race was the predominant factor determining the border." *See* JS at 87a-88a, 99a.

[18] As Judge Ervin correctly observed, the *Cromartie* plaintiffs' evidence that District 12 excluded certain precincts with a large number of registered Democrats did not undermine the credibility of this evidence, for several reasons. First, it consisted not of a comprehensive examination of the district's entire circumference, but of selective examples. Second, it ignored the fact that the legislators who drew the plan said they used *actual election results*, rather than party registration figures, to construct the district's lines in recognition of the fact "that voters often do not vote in accordance with their registered party affiliation." JS at 33a-36a. Indeed, he found the evidence that race had predominated in the design of District 12 so weak that he would have entered summary judgment *against* the *Cromartie* plaintiffs on that claim. JS at 43a-44a.

E. THE INTERIM PLAN

The district court allowed the General Assembly 30 days to redraw the state's congressional redistricting plan to correct the defects it had found in the 1997 plan. On May 21, 1998, the General Assembly enacted an interim congressional redistricting plan, 1998 Session Laws, ch. 2 ("the Interim Plan"), and submitted it to the district court for approval. The Interim Plan specifically provides that it is effective for the 1998 and 2000 elections only if this Court fails to reverse the district court decision holding the 1997 plan unconstitutional. The Department of Justice precleared the Interim Plan on June 8, 1998. On June 22, 1998, the district court entered an order tentatively approving the Interim Plan and authorizing the State to proceed with the 1998 elections under it.[19] JS at 175a-180a.

SUMMARY OF ARGUMENT

The judgment below is riddled with errors; it cannot stand. Initially, in holding that plaintiffs were entitled to summary judgment on their District 12 claim, the district court committed three critical errors. First, the court improperly required the state defendants to bear the burden of persuasion at summary judgment, when this Court's cases make clear that burden lies with the plaintiffs. Second, the court found the predominance standard satisfied by evidence falling far short of that which this Court has previously found sufficient to impugn the considered choices of a state legislature. Third, the

[19] On July 17, 1998, plaintiffs noticed an appeal from that order. This Court has yet to act on that appeal.

court failed to accord the testimony of state legislators a presumption of truthfulness and engaged instead in unfounded second-guessing of their motivations, which this Court's precedents forbid it to do. Each of these errors independently provides sufficient basis for reversing the lower court's entry of summary judgment for the plaintiffs.

The uncontroverted evidence in the summary judgment record established that the legislature designed the districting plan as a whole, and District 12 in particular, to preserve the existing partisan balance in the State's congressional delegation, and that it used actual election results, not voter registration data, to accomplish this purpose. In denying the defendants' motion for summary judgment, the district court made at least two critical errors. First, it relied on voter registration data, which the legislature did not use in designing District 12. Second, it relied on limited information about a handful of isolated precincts rather than carefully and fully examining the design of the district as a whole. Had the district court not made these errors, but correctly applied the law to the uncontroverted facts before it, it would have been compelled to enter summary judgment for the defendants.

North Carolina's District 12 is a majority-majority district with a substantial minority population. Its boundaries were drawn on the basis of actual voting patterns in order to create a plan that would preserve the existing partisan balance in the State's congressional delegation. Such a district, even if somewhat oddly shaped, does not give rise to any of the harms with which the *Shaw* doctrine is concerned. Because applying the strict scrutiny of *Shaw* to such a district represents a

substantial - and indefensible - extension of this Court's case law, the district court's decision must be reversed.

ARGUMENT

I. THE DISTRICT COURT'S JUDGMENT SHOULD BE REVERSED BECAUSE PLAINTIFFS FAILED TO CARRY THEIR BURDEN OF PROVING THAT RACE WAS THE PREDOMINANT FACTOR IN THE DESIGN OF DISTRICT 12.

In concluding that the defendants' stated purposes for drawing the boundaries of District 12 were false, and that race was instead the predominant motivating factor, the district court committed at least three manifest errors. First, the court improperly required the state defendants to bear the burden of persuasion at summary judgment, when this Court's precedents make clear that burden lies with the plaintiffs. Second, the court found the *Miller* predominance standard satisfied on a significantly lower evidentiary showing than this Court has required in previous redistricting cases. Third, the court failed to accord the State's testimony a presumption of truthfulness, a presumption mandated by this Court's precedents. In light of these fatal deficiencies, the district court's grant of summary judgment to plaintiffs should be overturned.

A. THE DISTRICT COURT APPLIED AN IMPROPER EVIDENTIARY STANDARD IN GRANTING PLAINTIFFS' SUMMARY JUDGMENT.

A motion for summary judgment must be resolved by reference to the evidentiary burdens that would apply at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-54 (1986). When a party seeks summary judgment on an issue on which he will have the burden of persuasion at trial, he is entitled to prevail only if the evidence in the summary judgment record is such that no reasonable fact finder hearing that evidence could fail to find for him on that issue.[20] *See id.* at 252-55. In other words, the movant's evidence, viewed in the light most favorable to his opponent, must be "so one-sided" that he would be entitled to judgment as a matter of law at trial. *See id.* at 249-52 (explaining that the summary judgment standard "mirrors" the Rule 50(a) standard for a directed verdict at trial). Under this stringent standard, a party who has the burden of persuasion at trial is seldom entitled to summary judgment in his favor. *See* 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.03[4], at 56-37 through 56-38 & n.54; *id.* § 56.11[1][b], at 56-90 through 56-91 (3d ed. 1997).

In this case, the burden of persuasion at trial for proving that race was the predominant factor in the design of District 12

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[20] By contrast, a party who will *not* have the burden of persuasion at trial may obtain summary judgment simply by showing that his opponent has insufficient evidence to permit a reasonable finder of fact to return a verdict in his favor. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324-26 (1986).

clearly rested with the plaintiffs. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995) (the plaintiff bears the burden of proving the race-based motive). The district court ignored this allocation of the burden of proof in concluding that the plaintiffs were entitled to summary judgment. Indeed, a careful reading of the court's opinion makes clear that despite the court's assertions, it analyzed plaintiffs' motion under the standard that applies to parties who will *not* have the burden of persuasion at trial.[21] *See* JS at 21a (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). On this basis alone, the court's decision should be overturned.

B. PLAINTIFFS FAILED TO SATISFY THE DEMANDING PREDOMINANCE STANDARD NECESSARY TO SUPPORT STRICT SCRUTINY.

In addition to misallocating the burden of persuasion, the district court failed to require a sufficient evidentiary showing that race - and not neutral redistricting criteria - was the predominant factor motivating the State's redistricting plan. Had the district court applied the proper standard, it could not

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[21] That the court also had before it the state defendants' cross-motion for summary judgment should have had no bearing on its analysis of the plaintiffs' motion. *See* 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.10[6] (3d ed. 1997) (cross-motions for summary judgment must be evaluated independently, according to the usual summary judgment standard, and the denial of one does not imply the grant of the other); *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d. 228, 230 (CA1 1996) (cross-motions for summary judgment do not alter basic Rule 56 standard, nor do they necessarily warrant the grant of summary judgment to either party).

have justified a grant of summary judgment. *See Anderson*, 477 U.S. at 252-55.

In *Shaw I*, this Court first recognized that a facially race-neutral electoral districting plan could, in certain exceptional circumstances, be a "racial classification" subject to strict scrutiny under the equal protection clause. *Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 642-44, 646-47, 649 (1993). Two years later, in *Miller*, this Court established a narrow condition for the application of strict scrutiny: compelling evidence "that *race for its own sake*, and not other districting principles, was the legislature's *dominant and controlling rationale* in drawing its district lines." 515 U.S. at 913 (emphasis added). To satisfy this standard at the summary judgment stage, a plaintiff must prove that the evidence, viewed in the light most favorable to the defendant, demonstrates that the legislature "subordinated traditional race-neutral districting principles . . . to racial considerations," such that race was "the predominant factor" in the design of the districts. *Id.* at 916.

In *Miller*, this Court recognized that "[f]ederal court review of districting legislation represents a serious intrusion on the most vital of local functions," that redistricting legislatures are almost always aware of racial demographics, and that the "distinction between being aware of racial considerations and being motivated by them" is often difficult to draw. 515 U.S. at 915-16. For these reasons, this Court directed the lower courts to "exercise extraordinary caution" in applying the predominance test. *Id.* at 916; *see id.* at 928-29 (O'Connor, J., concurring) (stressing that the *Miller* standard is a "demanding"

one, which subjects only "extreme instances of [racial] gerrymandering" to strict scrutiny).

In its various opinions in *Bush*, this Court made clear that neither proof the legislature considered race as a factor in drawing district lines nor evidence the legislature neglected traditional districting criteria is sufficient to trigger strict scrutiny. *Bush v. Vera*, 517 U.S. 952, 958, 962 (1996) (plur. op.). Instead, strict scrutiny applies only when the plaintiff establishes *both* that (1) the State *substantially* neglected traditional districting criteria in drawing district lines, *and* (2) that it did so *predominantly* because of racial considerations.[22] *Id.* at 962-63 (plur. op.); *id.* at 993-94 (O'Connor, J., concurring).

In this case, plaintiffs clearly failed to meet their evidentiary burden. A comparison of the evidence proffered in the Court's prior cases with that offered by the plaintiffs in this case bolsters this conclusion. For instance, before applying strict scrutiny and overturning Texas' redistricting plan in *Bush*, a plurality of the Court found not only that Texas' district was irregular in shape, but also that there was "substantial *direct* evidence of the legislature's racial motivations." 517 U.S. at 960 (emphasis added). This evidence included the state's preclearance report to the Justice Department, which

[22] Since *Bush*, this Court has twice applied this same formulation of the threshold test for strict scrutiny. *See Lawyer v. Department of Justice*, 521 U.S. 567, __, 117 S. Ct. 2186, 2194-95 (1997) (finding standard not satisfied); *Shaw v. Hunt*, (*Shaw II*), 517 U.S. 899, 906-07 (1996) (finding standard satisfied).

"report[ed] a consensus within the legislature that the three new congressional districts 'should be configured in such a way as to allow members of racial, ethnic, and language minorities to elect Congressional representatives.'" *Id.* Because of this goal, the report acknowledged, three majority-minority districts were created. *See id.* at 960-61. In addition, the plurality found that Texas legislators had used an unprecedented computer program that "permitted redistricters to manipulate district lines on computer maps," making "more intricate refinements on the basis of race than on the basis of other demographic information." *Id.* at 961-62. Taken together,[23] the plurality held, these findings justified the application of strict scrutiny.[24]

Likewise, in *Miller* and *Shaw II*, the Court applied strict scrutiny only after finding that the districts' bizarre geographic shapes, *coupled with* the state defendants' admissions that they had intentionally set out to create majority-minority districts, established that race was the predominant factor in the design of those districts. *See Miller*, 515 U.S. at 917-18 (citing Georgia's admission that it "would not have added those portions of" the counties "but for the need to include additional black population in that district"); *Shaw II*, 517 U.S. at 906 (citing the State's preclearance submission, which

[23] Notably, the Court emphasized that it was not holding that "any one of these factors is independently sufficient to require strict scrutiny." *Bush*, 517 U.S. at 962.

[24] Justices Thomas and Scalia, who joined in the judgment, held that the state's admission that it intentionally created majority-minority districts was sufficient to justify strict scrutiny. *See id.* at 1002. No such admission has been made in this case.

acknowledged that the district's "*overriding* purpose" was to create two majority-minority districts). No such evidence is present in this case.

1. Plaintiffs' Circumstantial Evidence Derived From The Shape And Demographics Of The District Was Inadequate To Establish The Predominant Use Of Race.

In this case, the *only* evidence in the record that could even remotely support the plaintiffs' assertion of a predominantly racial motive in District 12's design was an inference the plaintiffs asked the court to draw from the district's shape and racial demographics.[25] This evidence was legally insufficient to sustain plaintiffs' burden on summary judgment. While District 12 is admittedly less compact than the State's other districts, it covers a significantly smaller radius than the State's earlier plan, is contiguous and roughly equal throughout in length, and it does not rely on artificial devices such as cross-overs and double cross-overs to achieve that contiguity. *See* JS at 36a (Ervin, J., dissenting) (citing Affidavit of Dr. Gerald R. Webster). Of the 12 districts in the 1997 plan, it "has the third

[25] Plaintiffs presented various maps and demographic data, as well as the affidavits of several experts who relied on the same evidence of shape and racial demographics to opine that race was the predominant factor used by the State to draw the boundaries of the congressional districts. *See, e.g.*, Declaration of Dr. Ronald E. Weber JA at 219-20. But as this Court has explained in another context, "the postenactment testimony of outside experts is of little use" in determining the legislature's purpose in enacting a particular statute, when none of those experts "participated in or contributed to the enactment of the law or its implementation." *Edwards v. Aguillard*, 482 U.S. 578, 595-96 (1986).

shortest travel time (1.67 hours) and the third shortest distance (95 miles) between its farthest points." JS at 105a.

Equally as important, unlike in *Bush*, *Miller* or *Shaw II*, the record itself is devoid of any support for plaintiffs' assertion that race was the overarching motivation for the district's design. District 12 was not the product of the Department of Justice's invalid "black maximization" policy. There were no concessions of racial motivations by the state defendants; there were no race-based admissions in the myriad of indicators traditionally used to glean legislative intent - the plain language of the legislation, the committee hearings, the committee reports, the floor debates, the State's § 5 submissions - and there were no acknowledgments in the post-enactment statements of those who participated in the drafting or enactment of the plan that race was a motivating factor. *See* JS at 33a (Ervin, J., dissenting) ("Plaintiffs' have proffered neither direct nor circumstantial evidence that the General Assembly was pressured by the Department of Justice to maximize minority participation when it redrew the congressional districts in 1997."). Because plaintiffs' showing that race was the predominant factor in the design of District 12 was deficient, they were not entitled to summary judgment.

2. Defendants' Direct Evidence Clearly Established That Non-Racial Goals Were The Predominant Factor In The Design Of District 12. This Evidence Was Sufficient Not Only To Defeat Plaintiffs' Motion But To Obtain Summary Judgment For Defendants.

Far from supporting plaintiffs' position, the record contains substantial evidence that race was anything but a predominant factor in the design of District 12. The district court's decision thus warrants reversal not only because it sided improperly with plaintiffs but because it should have granted defendants' cross-motion for summary judgment.

The North Carolina legislature, exercising the state's right to design its own congressional districts, selected a number of traditional - and race-neutral - districting criteria to be used in constructing the 1997 plan: contiguity, respect for political subdivisions, respect for voters' needs and interests, preservation of the partisan balance in the State's congressional delegation, avoidance of contests between incumbents, and, to the extent possible while curing the constitutional defects in the prior plan, preservation of the cores of prior districts. JS at 73a-74a, 81a. The Court previously has found use of such districting criteria entirely legitimate.[26]

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[26] This Court has held that a state may draw district lines to allocate seats proportionately to major political parties. *See Gaffney v. Cummings*, 412 U.S. 735, 751-54 (1973); *see also Bush*, 517 U.S. at 963-64, (opinion of O'Connor, J., joined by Rehnquist, C.J. and Kennedy, J). This Court also has held that both preserving the cores of prior districts and avoiding contests between incumbents are legitimate state districting goals. *See*

The State's lawful, non-racial motivations were confirmed by affidavits from the legislators who headed the legislative committees that drew the 1997 plan and shepherded it through the General Assembly. These legislators testified under oath that they and their colleagues were well aware, when they designed and enacted the 1997 plan, of the constitutional limitations imposed by this Court's decisions in *Shaw* and its progeny, and that they therefore took pains to ensure that race was not the predominant - or even a significant - factor in the design of any of its districts. Rather, the legislature's overarching goal was preservation of the six-to-six Democratic and Republican electoral balance. Maintenance of the existing electoral balance was essential to gain passage of any new redistricting plan since the Senate was Democratic-controlled and the House was dominated by Republicans. *See* JS at 70a-72a, 81a. As Senator Cooper stated, "I knew that any plan which gave an advantage to Democrats faced certain defeat in the House while any plan which gave an advantage to Republicans faced certain defeat in the Senate." JS at 73a. "Preserving the existing partisan balance, therefore, was the only means by which the General Assembly could enact a plan as required by the Court." *Id. See also* JS at 37a (Ervin, J., dissenting) (noting that District 12 had to be drawn to protect incumbents).

Karcher v. Daggett, 462 U.S. 725, 740 (1983); *White v. Weiser*, 412 U.S. 783, 791, 797 (1973); *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966); *see also Bush*, 517 U.S. at 964 (opinion of O'Connor, J., joined by Rehnquist, C.J. and Kennedy, J).

At the summary judgment stage, the district court was obligated to accept this testimony as truthful. *See Liberty Lobby*, 477 U.S. at 255 ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor"). But instead the court did precisely the opposite - it assumed that these North Carolina legislators had lied under oath in order to hide a racial agenda.[27] In so doing, the court only compounded its errors. As this Court has held repeatedly, courts may not blithely attribute unconstitutional motivations to state legislators. *See Miller*, 515 U.S. at 915-16; *Mueller v. Allen*, 463 U.S. 388, 394 (1983).[28] This Court has made clear that these cautionary principles are fully applicable in *Shaw* cases. *Miller*, 515 U.S. at 915 ("Although race-based decisionmaking is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed." (citation omitted)); *id.* at

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[27] That the finder of fact at trial would be the three-judge panel, rather than a jury, does not excuse the court's failure to credit this testimony. Even in a non-jury case, a court ruling on a motion for summary judgment is obligated to accept the testimony of the nonmoving party's witnesses as true. *See, e.g., Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1123-25 (CA5 1978); *Borden, Inc. v. Spoor, Behrins, Campbell, Young, Inc.*, 828 F. Supp. 216, 218-19 (S.D.N.Y. 1993).

[28] When a federal court is called upon to judge the constitutionality of an act of a state legislature, it must "presume" that the legislature "act[ed] in a constitutional manner," *Illinois v. Krull*, 480 U.S. 340, 351 (1987); *see McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 809 (1969), and remember that it "'is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution.'" *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring)).

916 (courts adjudicating *Shaw* claims are obligated to accord the challenged plan "the presumption of good faith that must be accorded [all] legislative enactments"). Indeed, the presumption of legislative good faith has even greater force in redistricting cases, given the "sensitive" and highly political nature of the redistricting process and the "serious intrusion" on state political judgments that federal court review of state districting legislation entails. *See id.* at 916 (admonishing lower courts "to exercise *extraordinary caution* in adjudicating claims that a State has drawn district lines on the basis of race" (emphasis added)); *id.* at 916-17 (directing courts to bear in mind the demanding nature of "the plaintiff's burden of proof at trial" and "the intrusive potential of judicial intervention into the legislative realm" when assessing the adequacy of a plaintiff's showing at the summary judgment stage).[29]

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[29] Precisely for these reasons, lower federal courts entertaining *Shaw* claims have consistently refused to resolve the "predominance" issue without a full evidentiary hearing, except in cases where the defendants have conceded it. Indeed, the decision below is one of only two reported decisions in which a contested issue of "predominance" has been resolved in the *plaintiffs'* favor on summary judgment. The other, that of the three-judge panel in *Johnson v. Mortham*, 915 F. Supp. 1529 (N.D. Fla. 1995), also drew a vigorous dissent. *See id.* at 1560, 1563-68 (Hatchett, Circuit Judge, dissenting) (calling it "grave error" to resolve the "predominance" issue in plaintiffs' favor on summary judgment, given the "complex and important" nature of the case and *Miller's* "directive" to use "'*extraordinary caution* in adjudicating claims that a state has drawn district lines on the basis of race'") (emphasis in original)). The error committed here was even graver, for the plan being challenged in *Johnson* had been drawn by a court, rather than a legislature, making the "predominance" issue considerably less difficult than it is here - and the need for deference less pressing than that owed by a federal court to a state legislative branch.

In short, there was simply no justification for the district court to ignore this Court's directives and grant plaintiffs, rather than defendants, summary judgment. That it did so on such a weak showing - based on imputed motives and without full evidentiary hearing - is even less defensible. The decision should be overturned.

II. THE DISTRICT COURT WRONGLY DENIED THE STATE'S CROSS-MOTION FOR SUMMARY JUDGMENT BECAUSE THE STATE PRESENTED SUBSTANTIAL AND CREDIBLE EVIDENCE THAT DISTRICT 12'S SHAPE AND RACIAL DEMOGRAPHICS WERE THE RESULT OF LEGITIMATE, NON-RACIAL, POLITICAL MOTIVES.

Although partisan voting preferences determined the boundaries of District 12, the district court condemned the district on the basis of party registration data not relied on by the legislature. The district court's conclusion that race was the predominant factor is flawed because the court failed to distinguish between plaintiffs' irrelevant partisan *registration* figures and the actual partisan voting preferences demonstrated by voting *results* - the information in fact used by Senator Cooper and Representative McMahan in the redistricting process. This error was compounded by the court's rejection of a statistically reliable and systematic analysis of the district as a whole in favor of picking and choosing a few isolated examples from around the district. Because of these errors, the court failed to recognize the plaintiffs' utter failure of proof on their required burden to demonstrate predominance of racial

motivation, and hence, that summary judgment should have been granted to the State.

To the extent the shape of District 12 is somewhat irregular and its boundaries correlate with race, the plan's architects, Senator Cooper and Representative McMahan, testified that partisan election considerations, and not race, explain these results. JS at 69a-84a. Their testimony is confirmed by the extensive statistical analysis from Dr. David Peterson.[30] The district court failed to address Dr. Peterson's study, but instead, relied on maps supplied by plaintiffs from three of the six counties in the district. The district court focused on a handful of precincts that border District 12, but were not included in the district despite having Democratic voter-registration majorities, even though the registered Democrats in these districts consistently voted Republican. Because the court failed to require the plaintiffs to meet head-on the state defendants' contemporaneous and documented explanation for the district they drew, the court wrongly concluded that race, not partisanship, must have accounted for the design of District 12 and wrongly denied summary judgment to the State.

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[30] Dr. Peterson in his analysis traveled along the boundaries of the districts, comparing each precinct included in District 12 with each corresponding excluded precinct that adjoined District 12. From these comparisons, Dr. Peterson concluded that partisan explanations were "at least as strong" and "somewhat stronger" than racial ones in accounting for the District's design. JS at 98a.

A. The State's Reliance On Voting Behavior Does Not Trigger Strict Scrutiny.

This Court has upheld the use of partisan election results in the drawing of district lines so long as race is not used as a proxy for voting preferences. In *Bush*, a majority of this Court made clear that a district is not subject to strict scrutiny simply because there is some correlation between its lines and racial demographics, if the evidence establishes that those lines were in fact drawn on the basis of political voting preference, rather than race. *See* 517 U.S. at 968 (opinion of O'Connor, J., joined by Rehnquist, C.J. and Kennedy, J.) ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify, just as racial disproportions in the level of prosecutions for a particular crime may be unobjectionable if they merely reflect racial disproportions in the commission of that crime."); *id.* at 1027-29 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); *id.* at 1059-60 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting).

Contrary to the district court's suggestion, this is not a situation like that in *Bush*, where the state has used race "as a proxy for political characteristics" in its political gerrymandering.[31] *See* JS at 22a, n.7 (citing *Bush*, 517 U.S. at

[31] By contrast, the undisputed evidence here established that the racial data available to the North Carolina legislature was no more detailed than the other demographic data it used: racial demographics, voter registration and election results. All are reported at the precinct level. *Compare Bush*, 517 U.S. at 961-67, 969-70, 975 (plur. op.) (finding legislature's use of racial data that was significantly more detailed than its data on other voter

968 (plur. op.). Instead, the undisputed evidence in the record showed that the State used political characteristics, as represented by actual election results, not racial data, to draw the lines. *Bush* specifically stated, that the legislature's use of such "political data" to accomplish otherwise legitimate "political gerrymandering" will not subject the resulting district to strict scrutiny, "regardless of its awareness of its racial implications and regardless of the fact that it does so in the context of a majority-minority district." 517 U.S. at 968 (plur. op.); *see id.* at 1027-29 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); *id.* at 1059-60 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting). In this case, legitimate the use of political data to design District 12 - which did not result in a majority-minority district - does not trigger strict scrutiny and there is no racial classification to justify.

B. The Disparity Between Party Registration And Voting Behavior In North Carolina Explains The Shape And Racial Demographics Of District 12.

The district court's analysis of District 12 completely failed to take into account that voters in North Carolina often do not vote in accordance with their party affiliation. The affidavits in the record state that in predicting the partisan voting patterns of various precincts, the legislature did not rely on voter registration data but, rather, employed the far more meaningful and reliable method of *actual election results*. As Senator

demographics to be convincing circumstantial evidence that race had been its predominant consideration in designing the challenged districts).

Cooper's stated, "election results were the principal factor which determined the location and configuration of all districts in Plan A [the Plan at issue here] so that a partisan balance which could pass the General Assembly could be achieved."[32] The district court did not address the State's affidavits directly. Instead, relying on plaintiffs' maps, the court focused on a few precincts with Democratic majority voter registration rates that bordered District 12 but were not included in the district. Based on these isolated examples, the court concluded that the "uncontroverted material facts" demonstrate that District 12 was drawn based on racial identification, rather than political identification, because some Democratic majority precincts were bypassed in drawing the district. JS at 21a. But party registration data was precisely what the legislature chose *not* to use in constructing its districts, since such data was less reliable than actual voting histories in guaranteeing specific partisan outcomes.[33]

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[32] JA 73a. Representative McMahan's affidavit states: "The means I used to check on the partisan nature of proposed new districts was the election results in the General Assembly's computer data base (the 1990 Helms-Gantt election and the 1988 elections for Lieutenant Governor and one of the Court of Appeals seats)." JA 81a-82a.

[33] Even on the present record, the registration maps relied on by the court demonstrate that, with only very rare exceptions, the excluded precincts consistently have Democratic voter registration below 60%, while the adjoining precincts included in the district consistently have higher Democratic voter registration ranging from 60% to over 90%. On the rare occasions when a precinct within the district is between 50% and 60% in Democratic registration, the Democratic registration for each such district consistently is higher than that for its adjoining excluded precinct. *See* McGee Aff. (CD 61), Exs. N, O and P, lodged with the Court.

Far from this being a minor technical matter, the use of actual voting patterns rather than registration rates is highly probative on how precincts actually vote and hence which ones are genuinely safe Democratic precincts.[34] In North Carolina, many voters who have long been registered as Democrats vote Republican in national or statewide races.[35] In North Carolina, voter registration is obviously not a reliable indicator of actual voting patterns.[36]

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[34] Not until its memorandum opinion was filed did the court indicate its misunderstanding of the relevance of registration data. If given the opportunity to address the court's concern, the defendants would have provided the far more probative election results for the excluded precincts highlighted by the court. The majority of these precincts show dominant Republican voting majorities.

[35] As of 1990, 65% of the State's voters were registered as Democrats and 30% as Republicans. Yet in the 1988 Presidential election, George Bush received 58% of the vote compared to Michael Dukakis' 42%; in 1992, George Bush and Bill Clinton each received 43%. Since 1992, the State has had two Republican Senators. *See* The Almanac of American Politics 1990, 1994 and 1996. (The demographic and registration data available on the State's redistricting computer is based on 1990 information.)

[36] If voter registration were a reliable measure of partisan preference, then the Republican-controlledState House would never have agreed to the redistricting plan. Based on registration figures, 10 of 12 districts have Democratic majorities in registration and an eleventh district has a Democratic plurality (49.32% Democratic to 43.81% Republican). There is one Republican district, but only with a plurality in registration (46.80% Republican to 46.55% Democratic). JA at 105-07. District 12 itself demonstrates the often significant disparity between registration and voting patterns: the District has a 75% Democratic registration, but only a 62% Democratic preference in election results. JS at 99a.

Seeking to generate a congressional districting plan that would as a whole preserve the existing partisan balance, and seeking to make District 12 a Democratic district as part of this plan, the legislature for understandable reasons did not rely on voter registration rates, but on actual election data - as the two key political actors, Senator Cooper and Representative McMahan, testified in their affidavits. The magnitude of the court's error in failing to consider the proper criteria in its equal protection analysis warrants reversal of the court's decision.

C. To Determine The Legislature's Predominant Motivation In Designing A District, The Court Must Consider The District As A Whole.

The court's analysis was deficient in other key respects. In weighing the evidence before it, the court both examined the wrong criteria and focused on isolated precincts, rather than reviewing the design of the district as a whole. Had the court conducted the complex predominant motive inquiry properly, it could not have justified a grant of summary judgment to plaintiffs. The court also did not take into account the statistically sound and comprehensive analysis of District 12 made by Dr. Peterson. The results of this report should have, at a minimum, raised a genuine issue of material fact and more likely, helped establish defendants' entitlement to summary judgment.

Judicial inquiry into the design of a congressional district is a complex and demanding task. In the legislative districting context, partisan actors must make decisions about the general

location of the various districts in the plan as a whole. These are strongly interlocking decisions, of course, because for partisan purposes, what matters is not any district in isolation, but the predicted partisan effects of the plan as an entirety. *See, e.g., Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring in the judgment) ("The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level.").

This is the general, complex context against which courts must adjudicate the role of race - and in particular, whether race predominated. In this case, the district court failed to apply the "predominant motive" standard in a manner that systematically analyzed District 12 as a whole. District 12 contains 155 precincts. Yet, the district court focused on three of the six included counties, and concentrated on only 32 excluded precincts with Democratic voter-registration majorities. Based on its isolation of these particular precincts, the district court wrongly concluded that the district as a whole had been drawn with a predominantly racial purpose. Thus, even if the court had not misunderstood the difference between voter registration data and actual election results, its approach to applying *Shaw* - by picking and choosing selected features of a district, rather than examining the district as a whole - was fatally flawed.

There are likely a number of techniques through which lower courts statistically could analyze the predominant redistricting motivation for a district as a whole. Here the State offered one such approach. The State submitted an extensive

statistical analysis from an expert statistician that did not isolate a small number of precincts, but instead comprehensively examined all of District 12 and its surrounding territory. Dr. Peterson concluded that racial considerations did not predominate in the drawing of District 12. JS at 87, 98a. This statistical analysis, along with the testimony of the legislators, should have been enough to enable the State not only to defeat plaintiffs' motion for summary judgment, but also to obtain judgment in its favor. This is not to say that this statistical analysis is the only means of bringing more than anecdotal perspectives to bear on applying the predominant motive test. But this method of analysis does provide at least one way lower courts, as well as redistricters seeking to comply in good faith with *Shaw*, can gain more concrete guidance into how to assess whether the predominant motive for a district or districting plan rests on constitutional permissible considerations.

The point of such method is to offer a more reliable means than intuitive, ad hoc, and necessarily subjective approaches to judging the "predominant motive" in these highly charged, yet analytically complex cases. In other areas of the judicial oversight of districting, this Court has similarly turned to more systematic or quantitative approaches, in part to make the application of legal standards administrable for both lower courts and redistricters. Thus, in giving content to the concept of racial polarization under Section 2 of the Voting Rights Act, this Court endorsed the use of homogenous precinct and ecological regression analysis. *Thornburg v. Gingles*, 478 U.S.

30, 58-61 (1986).[37] More systematic and quantitative means of overseeing districting decisions are less easily manipulable by political actors engaged in what is the most intensely partisan and self-regarding of all political acts; they also enable redistricters seeking in good faith to comply with their statutory and constitutional obligations to know those obligations with greater clarity. The absence of such standards encourages not only manipulation, but also litigation, and therefore requires courts to get drawn into overseeing redistricting on a case-by-case basis in a far more intrusive way.

The district court dismissed Dr. Peterson's extensive analysis simply by pointing to various excluded "Democratic" precincts that bordered the District. Even had the court not been factually mistaken (in its reliance on voter registration rather than voter behavior data), its leap from an examination of selected excluded precincts to a judgment about the districting process as a whole was legally defective. For what the court did was to reject the State's comprehensive assessment of the District as a whole in favor of focusing on a few "pick-and-choose" examples. In essence, the district court ignored or dismissed a complete, statistically reliable result by offering up some anecdotal points that ran contrary to the overall pattern. Both legally and statistically, the court's approach is unsound. The predominance standard requires methods by which the

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[37] Similarly, after malapportionment became constitutionally actionable under *Baker v. Carr*, 369 U.S. 186 (1962), this Court came to adopt a quantitative standard - one person, one vote - partly on the grounds that such a standard was more administrable than more subjectively defined standards.

court can examine a district systematically and comprehensively as a whole before concluding what motive predominated in the overall districting process.

Shaw was announced as a doctrine for extreme, aberrational cases. Under an approach that enables plaintiffs to focus on discrete segments of a district, such as the district court employed here, *Shaw* would expand even further. Indeed, if plaintiffs are encouraged to target particular segments of a district, rather than adducing proof for the district as a whole, *Shaw* will begin to engulf the most microscopic aspects of redistricting. To keep judicial oversight administrable, this Court should clarify that the predominant motive test must be applied to districts as a whole, rather than in the piecemeal fashion permitted by the court below. The stated motivations of the legislators, which are supported by a comprehensive and valid statistical analysis, not only require reversal of the court's judgment, but also justify entry of judgment for defendants.

III. APPLICATION OF STRICT SCRUTINY TO DISTRICT 12 IS UNWARRANTED BECAUSE IT DOES NOT GIVE RISE TO THE KINDS OF HARMS WITH WHICH THE *SHAW-MILLER* DOCTRINE IS CONCERNED.

Shaw reflected constitutional concerns that arise "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group." *Shaw I*, 509 U.S. at 648. As this Court has consistently emphasized, it is the *excessive* use of race in districting, not the use of race as one factor, that triggers strict scrutiny. *Shaw's* "basic objective" is

to make "extreme instances" of racial gerrymandering subject to "meaningful judicial review." *Miller*, 515 U.S. at 929 (O'Connor, J., concurring).

As a doctrine designed for "extreme instances" of racial gerrymandering, *Shaw* has led already to courts finding unconstitutional most of the majority-minority congressional districts created in the South after the 1990 Census. If the district court's extension of the doctrine is allowed to stand, *Shaw's* sweep would truly be immense, extending to any district - whether majority-minority or majority-majority - with any significant level of minority population. Not only would this be at odds with the "basic objective" of *Shaw*, but it would undermine the very values that animate the *Shaw* line of cases.

Shaw and its progeny have identified several specific harms that the excessive use of race in districting can cause. First, it can cause "representational" harm. *United States v. Hays*, 515 U.S. 737, 744 (1995). When a district is "obviously . . . created solely to effectuate the perceived common interests of one racial group," certain voters suffer representational harm, because "elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Shaw I*, 509 U.S. at 648. Second, it can cause "expressive harm," *Bush*, 517 U.S. at 1053 (Souter, J., dissenting), by "convey[ing] the message that political identity is, or should be, predominantly racial," *id.* at 980 (plur. op.). Third, it can cause societal harm, "by carving electorates into racial blocs," *Miller*, 515 U.S. 927, which can "balkanize us into competing racial factions," *Shaw I*, 509 U.S. at 657.

District 12 does not trigger any of these concerns. Far from sending elected officials the message that they represent only the members of a particular racial group, *see Shaw I*, 509 U.S. at 648, District 12, which is majority-majority with a substantial minority population, requires candidates of *any* race - majority *or* minority - to appeal across racial lines to gain election. Given this reality, the concern that the representatives elected from this district will believe their "primary obligation" is to any particular racial group is simply not present.

Nor does District 12 give rise to any expressive harms. Since the district's borders were drawn based on actual voting patterns, rather than on racial characteristics, they do not convey the message that "members of the same racial group - regardless of their age, education, economic status, or the community in which they live - think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw I*, 509 U.S. at 647. Indeed, it would be racially stereotypical for a court to assume, simply because the district has a significant African-American population, that race was the predominant unifying factor when, in fact, these voters were linked together for a reason that *transcends* race - their *political* identity, as manifested by their engagement in political life and their allegiance to particular Democratic candidates and the issues for which those candidates stand. *Cf. DeWitt v. Wilson*, 515 U.S. 1170 (1995), *summarily aff'g*, 856 F. Supp. 1409 (E.D. Ca. 1994) (three-judge court) (strict scrutiny did not apply to majority-minority district that was drawn according to traditional race-neutral districting principles).

Finally, a district as racially mixed and politically harmonized as District 12 can hardly be seen as "balkanizing" the area into racial factions. The voting patterns in North Carolina revealed that certain precincts in the Piedmont Crescent - precincts that in fact happened to be predominately African-American - were consistently loyal to Democratic candidates, and thus could be joined with certain other precincts in the same area - precincts that in fact happened to be predominantly white - to create a "safe" Democratic district. That does not mean that North Carolina has been carved into racial blocks. The carving - if any - has been done along *political* lines, not racial lines. Separation of voters based on political identity does not offend constitutional norms, even when it happens to correlate to some degree with race. *See Bush*, 517 U.S. at 968 (plur. op.).

Even in the best of circumstances, redistricting is a daunting task for a state legislature. Where, as here, the state has a substantial minority population, with a demonstrated record of voting overwhelmingly for one party, and a divided legislature - with one house controlled by one party, and the other house by the other party - the task is still more difficult. If this Court extends *Shaw* to majority-majority districts with substantial minority populations, states in this position will find it virtually impossible to craft a plan that cannot be tied up for years in the courts.

The difficulty, simply put, is this: to command the approval of both houses of the legislature in such a state, a plan must draw districts that allocate seats proportionally between the two parties. To do so, it will almost certainly have to draw districts

with somewhat irregular shapes. This Court has authorized it to do that. *See Gaffney v. Cummings*, 412 U.S. 735, 751-54 (1973) (State may draw irregular district lines in order to allocate seats proportionately to major political parties); *Bush*, 517 U.S. at 964-65 (plur. op.) (same). But given the size of the minority population and its demonstrated preference for one political party in past elections, any plan drawn to allocate seats evenly between the two parties - even one drawn solely on the basis of partisan political data, like voting patterns in past elections - will almost certainly result in the creation of some districts which, though majority-majority, have a larger percentage of minority voters than others. If the combination of irregular lines and a substantial minority population is sufficient to make a majority-majority district subject to challenge under *Shaw*, then any plan which allocates seats proportionately to the two parties - hence is capable of passing both houses of the legislature - is vulnerable to challenge under *Shaw*. As North Carolina's experience demonstrates, the inevitable result will be that every plan the legislature manages to pass will be the subject of protracted litigation under *Shaw*,[38] and that the federal courts - not the state legislatures - will become the principal architects of the state's congressional and legislative districting plans. This Court should not countenance such an

[38] In this context, it is worth noting that plaintiffs continue to challenge District 12 in the 1998 Interim Plan. That district has a total population that is 62.69% white and 35.58% African-American, a voting age population that is 65.85% white and 32.56% African-American, and a registered voter population that is 66.72% white and 32.99% African-American. *See* Submission of 1998 Congressional Redistricting Plan (CD 94), Attachment 98C-27A-2.

unprecedented intrusion by the federal judiciary into this "most vital" aspect of state sovereignty. *See Miller*, 515 U.S. at 915.

The court below permitted plaintiffs challenging this majority-majority district to trigger the strict scrutiny of *Shaw* simply by showing that the district was somewhat irregular in shape and that its minority population exceeded the percentage of minority residents in the counties from which that district was created. This Court should make clear that the strict scrutiny of *Shaw* cannot be so easily triggered, and that it is appropriate only when the plaintiffs supplement their circumstantial evidence of shape and demographics with substantial *additional* evidence that race was the predominant factor in the district's design, as did the plaintiffs in *Miller*, *Bush* and *Shaw II*.[39] *See Lawyer*, 117 S. Ct. at 2195 (noting that

[39] This additional evidence might consist of statements from the state officials who drafted the plan and shepherded it through the legislature, indicating that they had deliberately set out to create a certain number of "safe" districts for minority-preferred candidates. *See Miller*, 515 U.S. at 916-19 (relying expressly on this kind of "more direct" evidence of a predominately racial purpose); *Bush*, 517 U.S. at 958-76 (plur. op.) (same). Because the best evidence of the legislature's purpose in enacting a particular statute is the conduct or statements of those who actually participated in or contributed to its enactment, *Edwards v. Aguillard*, 482 U.S. 578, 595-96 (1986), the Court might find that *only* that kind of "direct" evidence would suffice. *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 275-76 (1989) (O'Connor, J., concurring) (arguing that plaintiff in individual disparate treatment case under Title VII should be required to produce "direct" evidence of the defendant's impermissible motivation - defined as conduct or statements of the actual decisionmaker that bears directly on the motivation behind the challenged decision - to shift the burden of persuasion on motivation to the defendant); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096-97 (CA3 1995) (holding that plaintiffs are required to produce such "direct" evidence to obtain a burden-

this Court has "never suggested that the percentage of black residents in a district may not exceed the percentage of black residents in any of the counties from which the district is created," or that "similar racial composition of different political districts . . . [is] necessary to avoid an inference of racial gerrymandering in any one of them.").

Because the plaintiffs' only evidence that race was the predominant factor in the design of District 12 is an inference they ask the court to draw from its shape and racial demographics, their claim fails as a matter of law, and the state defendants are entitled to judgment as a matter of law.

CONCLUSION

For the forgoing reasons, this Court should reverse the district court's judgment for plaintiffs and remand for entry of judgment in favor of the state defendants. In the alternative, the Court should reverse the district court's judgment for plaintiffs and remand for trial.

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shifting instruction). But the Court need not resolve that question to decide this case, for the plaintiffs here have presented absolutely no additional evidence - "direct" or otherwise - to supplement the inference they ask this Court to draw from their evidence of shape and racial demographics.

Respectfully submitted,

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